

**Application No.:** 10/568,044  
**Filing Date:** August 18, 2006

### REMARKS

Claims 23, 25-32 and 35-42 are presently pending. Claims 16-22, 24, 33 and 34 are canceled without prejudice. Support for amendments to Claim 23 and new Claims 35-42 can be found in the Specification as filed as follows:

Claim	Examples of Support
23	Paragraphs [0008], [0015] and [0018]
35	Paragraphs [0027] and [0031]
36	Paragraphs [0016] and [0037]
37	Paragraph [0017]
38	Paragraphs [0016], [0017] and [0037]
39	Table 2
40	Table 1
41	Paragraph [0027]
42	Paragraphs [0013], [0014] and [0015]

No new matter has been added herewith. The following addresses the substance of the Office Action.

### Objection

Claims 16, 18 and 24 were objected to because they referred to a table in the specification. These claims are canceled, thereby rendering the objection moot.

### Indefiniteness

Claims 16, 18, 24, and dependent claims thereof, were rejected under 35 U.S.C. § 112, second paragraph as being indefinite. These claims are canceled, thereby rendering the rejection moot. Claims that were previously dependent on Claims 16, 18, 24 are amended so that they do not refer to Tables 4 and 5.

The Examiner also stated that it was not clear how the properties claimed by reference to Tables 4 and 5 would make the emulsion storable at temperatures up to 20°C. Applicants have removed recitation of being storable at temperatures up to 20°C.

In view of amendments to the claims, the Applicants respectfully request that the rejection under 35 U.S.C. § 112, second paragraph be withdrawn.

### **Anticipation**

Claims 16-20, 25-28 and 31-34 were rejected under 35 U.S.C. § 102(b) as being anticipated by Leshik (U.S. Patent No. 6,117,473). Leshik teaches a non-dairy, refrigerator-stable foam formulated from water, vegetable oil and an emulsifier. However referring to the abstract of Leshik, the reference teaches compositions with added protein, i.e., gelatin, which serves as a gelling hydrocolloid. Thus, Leshik does not disclose a non-dairy vegetable oil-in-water emulsion comprising 20% to 30% of hydrogenated fat and wherein said non-dairy vegetable oil-in-water emulsion is free from any dairy product or derivative, and is free from any protein source, and wherein said emulsion is treated by ultra high temperature (UHT).

To be anticipatory under 35 U.S.C. § 102, a reference must teach each and every element of the claimed invention. See *Hybritech Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d 1367, 1379 (Fed.Cir. 1986). “[A]nticipation requires that all of the elements and limitations of the claim are found within a single prior art reference.” See *Scripps Clinic & Research Foundation v. Genentech, Inc.*, 927 F.2d 1565 (Fed. Cir. 1991).

Since Leshik does not teach a composition that is free from any protein source, the pending claims are novel with regard to Leshik. Accordingly, the Applicants respectfully request removal of the rejection under 35 U.S.C. § 102(b).

### **Obviousness**

Claims 21-24 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Leshik (*supra*) in view of Murase (U.S. Patent No. 4,461,777).

The present invention provides a UHT treated, nondairy vegetable oil-in-water emulsion for whipping, which gives a whipped product that has a very good surface texture, high shape stability, and high overrun after whipping. The emulsion according to the invention combines these three aspects, in addition to being amenable to both pasteurization and UHT, without containing any protein source, either of dairy origin or otherwise. In contrast, referring to column 1, line 38 of Leshik, the reference merely teaches foams that are specifically free of dairy proteins. However, as mentioned above, Leshik teaches that the foams have added gelatin protein.

Based on the teachings of the cited references, the skilled person who desired to improve the stability and overrun of a non-dairy whipping cream would add proteins because both Leshik

and Murase describe emulsions that comprise proteins. Such proteins are known and used for their stabilizing properties. Leshik et al. specifically teaches a non-dairy, refrigerator-stable foam that contains a gelling hydrocolloid such as gelatin. Referring to the second table at column 3, all of formulas A, B, C and D contain gelatin. Murase describes an emulsion comprising milk protein and/or vegetable protein. Thus, the references teach away from the presently claimed emulsions and related methods, because they specifically teach the addition of protein. As such, the present claims are in compliance with 35 U.S.C. § 103(a) in view of Leshik and Murase.

Claims 29-30 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Leshik (*supra*) in view of Moussa (U.S. Patent No. 6,833,231). As stated above, Leshik specifically teaches the addition of gelatin protein. Since Claims 29 and 30 are ultimately dependent on Claim 23, the method of Claims 29 and the whipped topping of Claim 30 are not obvious since the non-dairy vegetable oil-in-water emulsion of Claim 23 is a novel composition.

With regard to Moussa et al, the reference relates to a liquid, radiation-curable composition, which is a non-edible, resin composition that has no comparable features or properties when compared to the presently claimed emulsion. Nothing in Mousa et al. would lead one of ordinary skill in the art to develop the presently claimed vegetable oil-in-water emulsions that are free from any protein source. As such, the combination of Leshik and Moussa et al. reference does not support *prima facie* obviousness for the claimed methods and compositions.

In view of the foregoing, the skilled person would not find any reason to develop the claimed compositions and methods. As such, the Applicants respectfully request that the rejections under 35 U.S.C. § 103(a) be withdrawn.

No Disclaimers or Disavowals

Although the present communication may include alterations to the application or claims, or characterizations of claim scope or referenced art, Applicant is not conceding in this application that previously pending claims are not patentable over the cited references. Rather, any alterations or characterizations are being made to facilitate expeditious prosecution of this application. Applicant reserves the right to pursue at a later date any previously pending or other broader or narrower claims that capture any subject matter supported by the present disclosure,

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including subject matter found to be specifically disclaimed herein or by any prior prosecution. Accordingly, reviewers of this or any parent, child or related prosecution history shall not reasonably infer that Applicant has made any disclaimers or disavowals of any subject matter supported by the present application.

### **CONCLUSION**

In view of Applicants' amendments to the Claims and the foregoing Remarks, it is respectfully submitted that the present application is in condition for allowance. Should the Examiner have any remaining concerns which might prevent the prompt allowance of the application, the Examiner is respectfully invited to contact the undersigned at the telephone number appearing below.

Please charge any additional fees, including any fees for additional extension of time, or credit overpayment to Deposit Account No. 11-1410.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

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